No. 86-747

In The Supreme Court Of The United States

OCTOBER TERM, 1986

STEPHEN B. HEINTZ, Commissioner of the Connecticut Department of Income Maintenance,
Petitioner,

v.

DALE HILLBURN, by his parents and next friends Ralph and Eleanor Hillburn, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER, STEPHEN B. HEINTZ, COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE IN SUPPORT OF THE GRANT OF CERTIORARI

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Printed by

Brescia's Printing Services
66 Connecticut Boulevard
East Hartford, CT 06108
525-6029

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The petitioner, Stephen B. Heintz, Commissioner of the Connecticut Department of Income Maintenance, files this reply brief in support of the grant of certiorari in order to respond to the claim raised in the respondents' brief in opposition that the petitioner has waived his claim that the inspection of care obligations of 42 U.S.C. § 1396a(a)(31) are not privately enforceable by a § 1983 cause of action. Contrary to the representations in respondent's brief at p. 21, the defense of failure to state a claim upon which relief can be granted

was raised in the petitioner's answer as his second defense, Appendix A, and was fully briefed in his trial memorandum, Appendix B, which trial memorandum was filed well before closing oral argument and the rendition of judgment on the merits by the district court.

Rule 12(h)(2) of the Federal Rule of Civil Procedure provides that a defense of failure to state a claim upon which relief can be granted "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment or the pleadings, or at the trial on the merits." The purpose of the rule is to *preserve* the enumerated defenses, notwithstanding a failure to assert the defense in a prior 12(b) filing. Wright and Miller, Federal Practice and Procedure, § 1392.

In addition to preserving the enumerated defenses notwithstanding the prior filing of a 12(b) motion, the rule favors the enumerated defenses by allowing them to be asserted either by motion, by pleading or "at the trial on the merits." The cases cited by the respondents in their brief in opposition only stand for the proposition that the defense must be asserted prior to a disposition on the merits by the trial court. For example, in *Black, Sivalls and Bryson v. Shondell,* 174 F.2d 587, 591 (8th Cir. 1949) cited by the respondents at p. 21, it was held that the failure to assert the defense until the filing of a motion for judgment notwithstanding the verdict (after the disposition on the merits by the jury) waived the defense. The authority cited by the respondent simply does not support a claim of waiver when the defense was asserted in the answer and was fully articulated in the petitioner's trial memorandum.

Furthermore, the issue was squarely presented to the court of appeals as an issue presented for review. Petitioner's Appellate Brief to the Second Circuit Court of Appeals at pp. 1, 46–49; Petitioner's Reply Brief to the Second Circuit Court of Appeals at pp. 12–23; Petitioner's Petition for Rehearing to the Second Circuit Court of Appeals at pp. 1, 2. In short, the issue was raised before the district court and the court of appeals and is properly presented to for review.

In closing, we note that the balance of the respondents' brief in opposition demonstrates the need for this Court to grant a writ of certiorari in order to review the decision below. Essentially, the respondents argue that the court below correctly interpreted the Medicaid Act as requiring that the "single state agency" be accountable for ensuring that every Title XIX assisted patient in skilled nursing facilities receive the services that he requires. The respondents further argue that the court below properly held that the petitioning Commissioner of Connecticut's single state agency must take whatever "corrective action" is required to achieve that result, including termination of qualified (i.e., certified) facilities from the program. The respondents, and the court below, however, rely entirely on general provision in the Act pertaining to the administrative responsibilities of the single state agency. The respondents, and the Court below, continue to ignore the specific provisions in the Act which place the responsibility for establishing and maintaining institutional standards, and for determining whether or not nursing facilities are qualified to participate, upon the state health inspection agency. 42 U.S.C. § 1396a(a)(9); 42 U.S.C. § 1396a(a)(33).[1] Certiorari

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[1] The respondents profess surprise at p. 15, fn. 12, of their reply brief at the position articulated by the petitioner that the skilled nursing facilities and the state health inspection agency should participate in litigation addressed to the adequacy of quality of care enforcement. As noted by the district court, the bounds of this litigation have been slippery and difficult to determine. Pet. App. 42A. The complaint filed by the plaintiffs appeared to only state a challenge to the petitioner's methodology of reimbursement for the cost of adaptive wheelchairs under the Medicaid program. Pet. App. 41A. At one point in time the petitioner did oppose certification of a defendant class of skilled nursing facilities; however, when it became apparent that the plaintiffs intended to address quality of care enforcement issues, the petitioner moved to dismiss this action in the district court for failure to join the skilled nursing facilities and the state health inspection agency. Motion to Dismiss Pursuant to Rules 12 and 19, denied December 7, 1983.

Consistently, throughout this litigation, the petitioner has contended that the state health inspection agency is responsible for quality of care enforcement. Both the district court and the court of appeals (erroneously) addressed the issue of the relative responsibility of the single state agency

(continued)

should issue in order for this Court to resolve this issue of considerable importance to the State and to its Title XIX-assisted patients of participating skilled nursing facilities.

Respectfully submitted,

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[1] *(continued)*

for quality of care enforcement vis-a-vis the state health inspection agency. Respondents' professed surprise is, therefore, quite misleading.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DALE HILLBURN, ET AL,	*	
Plaintiffs,	*	
V.	*	CIVIL NO. 82-200
EDWARD MAHER, ET AL,	*	
Defendants.	*	
	*	OCTOBER 28, 1982

ANSWER OF THE DEFENDANT, EDWARD MAHER, COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE

FIRST DEFENSE

1. Said defendant denies all of the allegations contained in paragraphs 8 and 12 of the plaintiffs' complaint.

* * *

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DALE HILLBURN, et al, Plaintiffs, vs. COMMISSIONER, CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE, et al, Defendants.	:	CIVIL NO. H82-200
	:	JULY 6, 1984

TRIAL MEMORANDUM OF THE COMMISSIONER, DEPARTMENT OF INCOME MAINTENANCE

(page 14)

III. PRINCIPLES OF LAW WHICH ARE APPLICABLE TO PLAINTIFFS' STATUTORY CLAIM.

A. Rules Of Statutory Construction

It is clearly established if a state elects to participate in a federal-state cooperative grant program, that the state is not obligated to implement all of the "goals" or "objectives" of the program but may only be required to provide those services that are *mandatory upon the state as a condition of participation. Quern v. Mandley,* 436 U.S. 725 (1978); *Beal v. Doe,* 432 U.S. 438 (1977); *Pennhurst State School v. Halderman,* 451 U.S.1 (1981).

(page 14 continued)

Moreover, the legitimacy of federal legislation enacted pursuant to Congress' Spending Power ". . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst State School v. Halderman, supra,* p. 17.

> "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*

Thus, in order to prevail on their statutory claim, the plaintiffs must show that the Act clearly and unambiguously imposes mandatory obligations upon the defendant in its administration of Connecticut's Title XIX Medicaid program, which this defendant has failed to comply with to the detriment of the plaintiff class.

B. Availability Of A Cause Of Action

Assuming that Title XIX of the Social Security Act, 42 U.S.C. § 1396a *et seq.,* clearly and unambiguously imposes mandatory obligations upon this defendant which this defendant has breached to the plaintiffs' detriment, the plaintiffs must also show that a cause of action is available to them to redress the violation. Prior to *Maine v. Thiboutot,* 448 U.S. 1 (1980), it was unclear whether § 1983 was available to provide a cause of action for the enforcement of purely statutory federal rights (or if § 1983 was limited to the enforcement of constitutional claims). In *Maine v. Thiboutot,* however, the Supreme Court interpreted the "and laws" provision of § 1983 as allowing for a cause of action to enforce federal statutes against state officials acting "under color of" state law.

The Supreme Court, however, promptly retreated from its *Thiboutot* decision by formulating a two-tier test which must be met before § 1983 can be available to enforce a federal statute. That test was initially announced in *Pennhurst State School and Hospital v. Halderman, supra,* and subsequently restated in *Middlesex County Sewerage Authority,* 101 S.Ct. 2615 (1981).

In *Pennhurst,* the Supreme Court first noted that the statutory rights alleged must be the sort of "rights secured" by the laws of the United States within the meaning of § 1983. *Pennhurst, supra,* p. 28. The Supreme Court then noted that § 1983 may not be available "where the governing statute provides an exclusive remedy for violations of the Act." *Id.*

The two-tier test announced in *Pennhurst* was subsequently reiterated in *National Sea Clammers* when the Court noted:

> "The Court . . . has recognized two exceptions to the application of § 1983 to statutory violations. In *Pennhurst State School and Hospital v. Halderman,* _____U.S._____ (1981), we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue was the kind that created enforceable rights under § 1983. 101 S.Ct. at 2625-26.

Moreover, in order for a statute to create "enforceable rights under § 1983," it is clear that the statute must create "individual rights." *National Sea Clammers, supra; Pennhurst, supra; Garrity v. Gallen,* 522 F. Supp. 171 (D.N.H. 1981).

Wherefore, in order to prevail on each of plaintiffs' Social Security Act claims, the plaintiffs must show that the statute creates *"individual rights"* under § 1983 and the statute does not provide for exclusive remedies. Because plaintiffs' claims arise out of different sections of the Social Security Act, the availability of a cause of action will be discussed separately for each statutory claim as part of subsequent sections of this memorandum.

* * *

B. A Cause Of Action Is Not Available To Enforce The Periodic Inspection Of Care Requirement.

Although one of the requirements that the state plan must meet is an explanation of how the "professional review team" will evaluate "the adequacy of the services available in particular skilled nursing facilities to meet the current health needs and promote the maximum physical well-being of patients receiving care in such facilities," no *statutory mechanism exists for the single state agency to deny payment to a certified provider because of a finding that a particular recipient did not receive SNF services* in accordance with the provisions of the Act. The Act merely requires the state plan to provide for the transmittal of "the findings resulting from such inspections, together with any recommendations, to the State agency administering or supervising the administration of the State plan." 42 U.S.C. § 1396a(a)(26).

Regulations of HHS are in accord in that the regulations provide that "the purpose of this review plan is to provide guidance to the Medicaid agency in the administration of the State plan, and where applicable, to the State licensing agency described in § 431.610." 42 C.F.R. 456.6(b) (emphasis added). Specifically concerning findings of inadequate care at skilled nursing facilities, HHS regulations in Title 42 only require that:

> § 456.612 Copies of reports
> The agency must send a copy of each report to — . . .
> (c) The agency responsible for licensing, certification, or approval of the facility for purposes of Medicare and Medicaid.
> 456.613 Action on reports
> The agency must take corrective action as needed based on the report and recommendations of the team submitted under this sub-part.

Although the above-cited regulation obscurely provides for the single state agency to "take corrective action as

needed,"* there is no authority in the Act for the state agency to terminate payment to a certified provider because of a finding of a professional review team. Nor is there any authority in the Act for the single state agency to direct an unwilling medical provider to provide a desired service for a particular patient [the provider must first "undertake to provide the service," 42 U.S.C. 1396a(a)(23)].

The foregoing analysis demonstrates that 42 U.S.C 1396a(a)(26) and 42 C.F.R. § 456.609 and § 456.610 do not create "personal rights" enforceable by § 1983, but are only intended to indirectly benefit Title XIX patients by promoting quality of care and by providing ". . . guidance to the Medicaid agency in the administration of the State plan and, where applicable, to the State licensing agency described in § 431.610."**

Furthermore, the second test on the availability of a cause of action is also not met since the Act explicitly provides for penalties that may be imposed upon the states as a result of ineffective periodic inspections — namely, a reduction of the federal medical assistance percentage that would otherwise be due to the State. 42 U.S.C. § 1396b(g). The record in this case indicates that the federal government implements its 42 U.S.C. § 1396b(g) disallowance authority by periodically assessing the Department's compliance and by taking disallowances, as appropriate F. XII-8.

* * *

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* The agency has taken corrective action, to the extent of its authority, by reviewing the findings with the facility, monitoring the facility's correction of deficiencies and by forwarding copies of the reports to the Connecticut Department of Health Services — the state health inspection agency.

**42 C.F.R. § 431.610 concerns the responsibility of the state health inspection agency to conduct surveys and certifications. This reference reinforces our position that survey and certification is the *exclusive* methodology authorized by the Act to take action against a facility for reasons of inadequate care.